SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1228

JEROME B. HANSEN,

Petitioner,

vs.

JOHN C. AHLGRIMM and
HARLEY BROWN,

Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion and order delivered in the courts below are not as yet officially reported, but are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Seventh Circuit improperly affirm the dismissal of a complaint filed under 42 U.S.C. Sec. 1983 on the basis of judicial immunity of a state court judge acting within his judicial role?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

State Statutes Involved: Sections 247.30, 247.37, 247.39, 251.72, 274.11, 274.17 and 295.03 of the Wisconsin Statutes. The cited statutes are set forth in the Appendix, pages 18-23.

This case involves 42. U.S.C. Sec. 1983, and Rule 12 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

In October, 1970, Jerome and Betty Hansen were divorced. Jerome did not like the divorce Judgment which ordered him to pay more than $100,000, and he appealed to the Wisconsin Supreme Court. Betty then sought an Order granting her temporary alimony and attorney's fees while the appeal was in progress. She also sought to compel Jerome to perform the Judgment or execute an undertaking. Both requests were made pursuant to the provisions of secs. 247.39 and 274.17 Wisconsin Statutes. The orders were duly entered by Judge Ahlgrimm. However, Jerome ignored the temporary orders and in accordance with provisions of secs. 247.39 and 295.03 Wisconsin Statutes, was ordered committed to jail. Jerome

then filed this civil rights action in Federal Court alleging that the County had conspired to deprive him of his liberty and various other constitutional rights in violation of 42 U.S.C. sec. 1983. Jerome sought $5,000 in compensatory damages and $200,000 in punitive damages. Both the attorney who represented Jerome's wife and the Judge filed a motion to dismiss for failure to state a valid claim. Judge Reynolds granted that motion.

Plaintiff appealed on four issues to the United States Court of Appeals for the Seventh Circuit. Pursuant to a motion to affirm without oral argument, the Court of Appeals affirmed the District Court in two issues by answering no to the issues:

I. Under the circumstances then and there obtaining, did the District Court err in ordering stays of the taking of depositions of defendants?

II. Did the District Court err in deciding the issues under Rule 12(b) of the Federal Rules of Civil Procedure rather than considering the motion a "speaking motion" and directing that the issue be joined pursuant to Rule 56 of the Federal Rules of Civil Procedure?

ARGUMENT

I. THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED A FEDERAL DISTRICT DECISION AND ORDER DISMISSING THE COMPLAINT AGAINST DEFENDANT JUDGE JOHN AHLGRIMM IN ACCORDANCE WITH THE GUIDELINES ESTABLISHED BY THE UNITED STATES SUPREME COURT.

A. JUDGES ARE IMMUNE FROM CIVIL SUIT UNDER 42 U.S.C. Sec. 1983 FOR ACTS WITHIN THEIR JUDICIAL RULES.

The action of the trial court appealed from by the petitioner and affirmed by order of the United States Court of Appeals for the Seventh Circuit arose pursuant to a motion under Fed. R. Civ. P. 12 (b) (6). The only inquiry on a motion to dismiss an action for failure to state a claim upon which relief can be granted is whether the plaintiff's allegations of wrong-doing are, as a matter of law, encompassed within the terms of the Statute upon which he relies for subject matter jurisdiction. See Gremellion v. Rinaudo, 325 F. Supp. 375 (E.D. La. 1971).

The petitioner alleges that defendant Ahlgrimm is civilly liable under the provisions of 42 U.S.C. Sec. 1983. There is a long line of cases deciding the immunity of judges for civil damages resulting from official acts. We quote the basic case in this regard. Yaselli v. Goff, 156 A.L.R. 1239, 12 F. 2d 369, affirmed 275 U.S. 503 (1927):

> "The Judge cannot be sued in a civil action on a complaint charging that his acts were a result of partiality, malice or corruption."

The immunity from civil prosecution under the Civil Rights Act was noted in Agnew v. Moody, 330 F. 2d 868, 869 (9th Cir. 1964):

> "We have repeatedly held that judges and quasi-judicial officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act for conduct in their official duties."

This is true even though a conspiracy is alleged. The court in Agnew v. Moody, supra, stated further at page 869:

> ". . . and although conspiracy is an essential element of the offense under 42 U.S.C. Sec. 1983, the doctrine of immunity nevertheless applies to acts under that section."

See also the case of Sullivan v. Kelleher, 405 F. 2d 486, (1st Cir. 1968), wherein the court stated at page 487:

> "The immunity afforded to judges 'extends to other officers of government whose duties are related to the judicial process' . . . the inclusion of opprobrious epithets such as alleging that a judicial officer acted maliciously or corruptly adds nothing to the legal complaint . . ."

The reports are replete with decisions granting immunity to myriad judicial or quasi-judicial officers. Rhodes v. Meyer, 334 F 2d 709 (8th Cir. 1964) certiorari denied, 379 U.S. 915 (1964) involving a state supreme court justice, state district judges, prosecuting attorneys, clerks of court, prison officials and members of the state integrated bar, sheriffs and law enforcement officers;

Harmon v. Superior Court, 329 F. 2d 154 (9th Cir. 1964) involving state judges, district attorney, sheriff, county clerk, probation officer, court trustee, county auditor and county treasurer; Puett v. City of Detroit, 323 F. 2d 591 (6th Cir. 1963), involving a municipal judge, assistant prosecuting attorney and corporation counsel; Cooper v. Wilson, 309 F. 2d 153 (6th Cir. 1962) involving a private attorney; Wise v. City of Chicago, 308 F. 2d 364 (7th Cir. 1962) certiorari denied, 372 U.S. 944 (1963), involving a city prosecuting attorney; Drum v. Gazzola, 216 F. 2d 709 (1st Cir. 1954), involving a police officer, superintendent of a reformatory and a state commissioner of correction; Rhodes v. Houston, 202 F. Supp. 624 (D.C. Neb. 1962) affirmed, 309 F. 2d 929 (8th Cir. 1962), certiorari denied 372 U.S. 909 (1963) involving a district judge, prosecuting attorney, clerk of court, and in certain instances, law enforcement officers and wardens.

The specific question of the civil liability of judges under the provisions of 42 U.S.C. Sec. 1983 was presented to the United States Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967). In that case, the Court said that the general provisions of 42 U.S.C. Sec. 1983 making "every person" liable for discriminatory actions does not control the immunity of judges to civil suit. "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." Pierson v. Ray, supra, at pages 554-5.

B. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED THE FINDING THAT DEFENDANT JUDGE JOHN AHLGRIMM WAS ACTING WITHIN HIS JUDICIAL ROLE DURING THE ACTS COMPLAINED OF BY THE PETITIONER.

The United States Court of Appeals for the Seventh Circuit has considered the purview of "judicial role" in Jacobsen v. Schaeffer, 441 F. 2d 127 (7th Cir. 1971), wherein Judge Duffy wrote at page 129:

> "Jurisdiction then is the test (of judicial role) and it too has been further refined. If a judge is viewed as acting 'in excess' of his jurisdiction, he still will be immune from suit. It is only when he has acted in the 'clear absence of all jurisdiction over the subject matter' that he may be sued for damages."

Resolution of this question, then, rests on whether Judge Ahlgrimm acted in the "clear absence of all jurisdiction over the subject matter." Both case law and statutory law support the proposition that Ahlgrimm had jurisdiction over the subject matter. The petitioner cites Estate of Mayer, 29 Wis. 497, 504-5, 139 N.W. 2d 111, 115 (1966) as authority for the proposition that Judge Ahlgrimm lost all jurisdiction over the case of Hansen v. Hansen when an appeal was taken from the divorce Judgment. (Petitioner's Brief for Certiorari at 14). The Court in Mayer goes on to qualify that rule:

> "This rule does not deprive the trial court of jurisdiction to hear and determine a matter

> which is separate from and independent of the matter determined by the judgment or order appealed from."

Estate of Mayer, supra. This qualification was reaffirmed by the Wisconsin Supreme Court in Hunter v. Hunter, 44 Wis. 2d 618, 621, 172 N.W. 2d 167, 169 (1969).

> "However, in matters not directly concerned with the appeal but still a part of the case, the trial court may properly retain its jurisdiction."

The case law basis for Judge Ahlgrimm's jurisdiction is supported by governing state statutory provisions. Sec. 247.39 Wisconsin Statutes provides "alimony or OTHER ALLOWANCE for a spouse or children when an appeal of a divorce or legal separation action is pending before the Supreme Court may be allowed under Supreme Court Rule 251.72." (Emphasis added)

Sec. 251.72 Wisconsin Statutes provides that only the trial court shall order an allowance or temporary alimony while a divorce or legal separation is pending on appeal.

Sec. 274.17 Wisconsin Statutes provides for the undertaking to stay the execution on money judgment and we quote Sec. 274.17 Wisconsin Statutes:

> "Sec. 274.17 Undertaking to stay execution on money judgment. If the appeal be from a judgment directing the payment of money it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any

part thereof be affirmed the appellant will pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal."

Wisconsin Statutes Sec. 247.37 provides for the effect of the judgment of a divorce and we quote Sec. 247.37:

"247.37 Effect of judgment of divorce. (1)(a) When a judgment of divorce is granted it shall not be effective so far as it affects the marital status of the parties until the expiration of one year from the date of the granting of such judgment, except that it shall immediately bar the parties from cohabitation together and except that it may be reviewed on appeal during said period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have entirely severed the marriage relation immediately before such death. The written judgment shall include the substance of the preceding language; and if the court orders alimony or other allowance for the wife or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable under Sec. 295.03 by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law. The findings of fact and conclusions of law and the written judgment shall

be drafted by the attorney for the prevailing party, and shall be submitted to the court and filed with the clerk of the court within thirty days after judgment is granted; but if the action has been uncontested, they shall first be submitted to opposing counsel, if any, and if the family court commissioner has appeared in the action, such original papers, together with copies thereof, shall also be sent to him for examination before submission of the same to the court." (Emphasis added)

The judgment required the defendant to perfect certain transfers of assets as allowance for the wife. The judgment also contained the customary disobedience clause punishable under Sec. 295.03 of the Wisconsin Statutes by commitment to the county jail for failing to comply with the terms of the final judgment. We quote Sec. 295.03 of the Wisconsin Statutes:

"295.03 Prison or house of correction for refusal to pay costs. When any order of the court or a judge shall have been made requiring the payment of costs or any other sum of money and proof by affidavit shall be made of the personal demand of such sum of money and of a refusal to pay it the court or judge may issue a warrant to commit the person so disobeying to prison or a house of correction until such sum and costs and expenses of the proceedings shall be paid. Where an order of the court, or a judge, in an action for divorce or legal separation, requires the payment of a sum or sums of money, the personal service of such order has been made upon the defendant, no proof of personal demand of such sum of

money and a refusal to pay shall be required before the defendant is punished as provided in this section."

The petitioner misconstrues the application of the above cited statutes. In petitioner's Brief for Certiorari at 14, the plaintiff-petitioner alleges that both Secs. 247.37 and 247.39 Wisconsin Statutes are immaterial to the issues in the instant case on the basis that they apply only to alimony or support orders during the pendency of an appeal. Such interpretation is far too narrow for the Statute. In each case, the Statute provides that "alimony or other allowances" may be declared by the trial court during the pendency of an appeal, not just alimony or support orders as the petitioner would suggest.

The court retained jurisdiction and was exercising its prerogatives on the basis of the applicable state statutes to enforce the orders of the court by commitment to county jail if necessary. Having retained jurisdiction, Judge Ahlgrimm was acting "within his judicial role" and is, therefore, immune from civil liability under the provisions of 42 U.S.C. Sec. 1983 by the rule of Pierson v. Ray, 386 U.S. 547 (1967).

II THE ORDER OF THE UNITED STATES CIRCUIT COURT FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED THE DECISION OF THE DISTRICT COURT ON THE MOTION TO DISMISS.

Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed if clearly without merit; and this want of merit may consist in an absence of law to support a claim of the sort made or in the disclosure

of some fact which will necessarily defeat the claim. See 2A Moore's Federal Practice, Sec. 12.08, p. 2271.

In analyzing the plaintiff's complaint on a motion to dismiss, only the well-pleaded material allegations are taken as admitted. See Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). When alleging conspiracy in violation of 42 U.S.C. Sec. 1983, facts must be pleaded describing the conspiracy and the extent to which it connected the private citizen to the state. In the absence of such a pleading, the complaint is insufficient. See Guidry v. Ford, 431 F. 2d 660, 664 (5th Cir. 1970). The absence of a sufficient pleading describing the conspiracy and the connection between the private citizen to the state left the instant complaint insufficient.

Further, on a motion to dismiss, the court can take judicial notice of Wisconsin law, and was not bound to accept conclusory allegations in the plaintiff's complaint. See Merriam v. Kunzig, 476 F. 2d 1233, 1239 (3rd Cir. 1973). In the instant case, the Court did view the well-pleaded allegations as admitted, and viewed them in a light most favorable to the plaintiff. However, the trial court was not obligated to accept as true the legal conclusions alleged in the complaint that defendant Judge Ahlgrimm acted without jurisdiction. The court was free to take judicial notice of Wisconsin law, and in the exercise of that discretion found the plaintiff's Brief failed to state a claim upon which relief could be granted.

The petitioner claims that the Court of Appeals erred in affirming the District Court's decision in

that the interpretation given by the District Court to Wisconsin Statutes was unsupported. This allegation must be denied in light of Wisconsin case law and the power of federal courts to take judicial notice of such law. The taking of judicial notice of a decision of the Supreme Court of the State where law is pertinent to the case has been recognized in the federal courts. See Florida Power Corporation v. Pinellas Utility Board, et al., 181 F. 2d 547 (5th Cir. 1950). Citing this power, the United States Circuit Court for the Seventh Circuit noted properly that Freeman Printing Co. v. Luebke, 36 Wis. 2d 298, 152 N.W. 2d 861 (1967) and Carpenter Baking Co. v. Bakery S.D. Local Union, 237 Wis. 24, 8 N.W. 2d 636 (1941), supported the District Court's finding on the jurisdiction of Judge Ahlgrimm's court after appeal.

The only matters de hors the record considered by either the District Court or the Appellate Court were matters properly within the purview of the Court's power to take judicial notice. The motion was not, therefore, treated as "speaking motion". Rather, it was properly treated as a motion to dismiss and decided by the use of powers given to the Court.

III. THE UNITED STATES SUPREME COURT SHOULD DENY THE PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI BECAUSE IT REQUESTS REVIEW OF A CASE BEFORE FINAL JUDGMENT HAS BEEN GIVEN IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner seeks review of an Order of the United States Court of Appeals for the Seventh Circuit which affirmed without oral argument two

of four issues presented by the petitioner's appeal. However, two of the four issues raised by the petitioner on appeal are presently before the Circuit Court of Appeals and are awaiting oral argument.

The respondent would urge that the petitioner's request for a Writ of Certiorari be denied on the basis of Rule 20 of the United States Supreme Court, 398 U.S. 1031 (1970) providing:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

In the instant case, two of the four issues urged by the petitioner in the court of appeals are still to be argued and decided. Since the petitioner has not shown that the case is of such imperative public importance as to justify deviation from normal appellate processes, the petition for a Writ of Certiorari should be denied.

CONCLUSION

As the Order of the Court of Appeals noted, the petitioner fails to adequately support his theories of immunity or civil procedure. In both the District Court and the Court of Appeals, it was noted that only well-pleaded material allegations were to be taken as admitted on a motion to dismiss. The allegations of the absence of immunity for defendant Judge John Ahlgrimm were and are unsupported. The petitioner failed to properly analyze Wisconsin

statutory provisions as interpreted by the Wisconsin Supreme Court. The petitioner also objects to the exercise of the power of judicial notice by the lower courts, but fails to cite authorities upon which to base this objection.

The facts and arguments which the petitioner presents do not form a substantial foundation for the United States Supreme Court to exercise the sound discretion and grant a Writ of Certiorari. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

DENNIS J. FLYNN
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John C. Ahlgrimm

APPENDIX

APPENDIX A

CONSTITUTIONAL PROVISIONS, TREATIES AND FEDERAL STATUTES INVOLVED

42 U.S.C. Sec. 1983. Civil Action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fed. Rules of Civil Procedure 12(b)

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other

defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX B

STATE STATUTES INVOLVED

247.30 Alimony, payment of and security for.

In all cases where alimony or other allowance shall be adjudged to either party or for the support or education of the children the court may provide that the same shall be paid in such sums and at such times as shall be deemed expedient, and may impose the same as a charge upon any specific real estate of the party liable or may require sufficient security to be given for payment according to the judgment; and upon neglect or refusal to give such security or upon the failure to pay such alimony or allowance the court may enforce the payment thereof by execution or under s. 295.03 or otherwise as in other cases. No such judgment shall become effectual as a charge upon specific real estate until the judgment or a certified copy thereof is recorded in the office of the register of deeds in the county in which the real estate is situated. History: 1971 c. 220.

247.37 Effect of judgment of divorce (1)(a)

When a judgment of divorce is granted it shall not be effective so far as it affects the marital status of the parties until the expiration of 6 months from the date of the granting of such judgment, except that it shall immediately bar the parties from co-habitation together and except that it may be reviewed on appeal during said period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have

entirely severed the marriage relation immediately before such death. The written judgment shall include the substance of the preceding language; and if the court orders alimony or other allowances for a party or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable under s. 295.03 by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law. The findings of fact and conclusions of law and the written judgment shall be drafted by the attorney for the prevailing party, and shall be submitted to the court and filed with the clerk of the court within 30 days after judgment is granted; but if the action has been uncontested, they shall first be submitted to opposing counsel, if any, and if the family court commissioner has appeared in the action, such original papers, together with copies thereof, shall also be sent to him for examination before submission of the same to the court.

247.39 Alimony or other allowance pending appeal.

Alimony or other allowance for a spouse or children when an appeal of a divorce or legal separation action is pending before the supreme court may be allowed under Supreme Court Rule 251.72.

251.72 Rule (Allowances in actions affecting marriage).

In actions affecting marriage pending in this court, no allowance for suit money, counsel fees or disbursements in this court, nor for temporary alimony or maintenance of the wife or children during the pendency of the appeal will be made in this court.

Such allowances, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to this court, provided, that if such allowance be ordered before the appeal is taken such order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal be perfected.

274.11 Appeal, how taken and perfected; notice; costs.

(1) An appeal is taken by serving a notice of appeal signed by the appellant or his attorney on each party adverse to him upon the appeal who appeared in the action or proceeding, and by filing a notice of appeal with the clerk of the court in which the judgment or order appealed from is entered. The notice shall state whether the appeal is from the whole of the judgment or order or from a part thereof, and if from a part only, shall specify the part appealed from. On appeals from a judgment the appellant shall serve the notice of appeal upon all parties bound by the judgment who have appeared in the action. All notices of appeal

shall contain the names and addresses of counsel, if known, for all parties upon whom service is required.

(2) An appeal may embrace two or more orders and may include or omit the judgment. In such case the notice of appeal shall designate with reasonable certainty the orders appealed from, or the part of them or either of them, or of the judgment appealed from. But one undertaking shall be required on such appeals, which shall be in the terms prescribed by subsection (3), except where the conditions thereof may be fixed by the court or judge, in which case the undertaking shall conform to the order made or directions given. If the appellant shall succeed in whole or in part he shall be allowed costs unless the supreme court determines otherwise. An appeal shall be deemed perfected on the service of the undertaking for costs or the deposit of money instead, or the waiver thereof. When service of such notice and undertaking cannot be made within this state the court may prescribe a mode of serving the same.

(3) The appeal undertaking must be executed on the part of the appellant by at least two sureties, to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250.

(4) The right of appeal shall exist from the time of the entry of the appealable order or judgment and in cases of appeal the supreme court shall have jurisdiction over the subject matter of the action from that time. The procedural requirements of subs. (1), (2) and (3)

and of this chapter shall relate only to the jurisdiction of the court over the parties to the appeal.

Cross References: As to filing an undertaking guaranteed by a surety company instead of by individual sureties, see 204.07. As to perfecting a defective appeal, see 274.32.

274.17 Undertaking to stay execution on money judgment.

If the appeal be from a judgment directing the payment of money it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any part thereof be affirmed the appellant will pay the amount directed to be paid by the judgment or the part of such amount at to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.

295.03 Prison or house of correction for refusal to pay costs.

When any order of the court or a judge shall have been made requiring the payment of costs or any other sum of money and proof by affidavit shall be made of the personal demand of such sum of money and of a refusal to pay it the court or judge may issue a warrant to commit the person so disobeying to prison or a house of correction until such sum and costs and expenses of the proceedings shall be paid.

Where an order of the court, or a judge, in an action for divorce or legal separation, requires the payment of a sum or sums of money and personal service of such order has been made upon the defendant, no proof of personal demand of such sum of money and a refusal to pay shall be required before the defendant is punished as provided in this section.